

California Regional Water Quality Control Board
Santa Ana Region

UPDATE

To The MARCH 15 , 2002

AGENDA

THIS ITEM WILL BE HEARD IN CLOSED SESSION

11. Vila Borba Update

California Regional Water Quality Control Board
Santa Ana Region

March 15, 2002

ITEM: 11

SUBJECT: Update on the Proposed Vila Borba Project

NOTE: This matter will be discussed by the Board in closed session. There will be no public discussion of this item at the March 15, 2002 Board meeting. The following report has been provided to the Board for orientation and discussion purposes during the closed session.

DISCUSSION:

The Vila Borba project is a proposed mixed-use and commercial development on approximately 340 acres in the City of Chino Hills. The project applicant is Mary Parente. The development would result in impacts to five intermittent drainages on the site and the loss of habitat occupied by least Bell's vireos, an endangered species.

Because of the fill impacts to the intermittent drainages, Ms. Parente was required to obtain a Clean Water Act Section 404 permit from the U.S. Army Corps of Engineers in order to proceed with the project. The 404 permit requirement triggered the need for Clean Water Act Section 401 certification from the Regional Board that the project would not result in violations of water quality standards. Water quality standards include water quality objectives and beneficial uses.

The Board and its staff have a lengthy history of interaction with Ms. Parente and her consultants concerning 401 certification for this project. The salient details are summarized, very briefly, below.

Ms. Parente submitted her original 401 application in December 1999. Board staff advised Ms. Parente that the information she had submitted was inadequate. Specifically, no mitigation for the adverse impacts of the project on water quality and beneficial uses was proposed. In addition, there was no documentation that California Environmental Quality Act (CEQA) requirements had been satisfied. CEQA compliance is a pre-requisite to 401 certification. Staff repeatedly requested the information and documentation necessary to address these deficiencies and we received repeated assurances that it would be provided. However, it was not.

In acting on 401 certification applications, Board staff is constrained by deadlines imposed, in part, by the Corps' regulations. These regulations stipulate that the state agency must act within 60 days after the Corps' acknowledgement of receipt of a valid request for certification, unless it appears that circumstances may require a longer period, in which case the Corps can grant an extension, no longer than one year.

Board staff worked closely with Corps staff on Ms. Parente's application. Corps staff granted us repeated extensions based on their own recognition of the deficiencies of the information provided by Ms. Parente. When it appeared that the latest extension

granted would expire without our receipt of the information we had requested, we advised Ms. Parente that we would be forced to deny the application without prejudice unless she withdrew the application and resubmitted it, thereby restarting the clock for our review. On February 15, 2001, Ms. Parente withdrew her application. She resubmitted it the next day.

After February 15, 2001, Board staff continued to request the information and documentation needed for us to proceed with appropriate action on the certification. Again, despite repeated assurances from Ms. Parente and her consultants that these materials would be provided, they were not. At Ms. Parente's last minute request, this matter was brought to the Regional Board at the meeting of June 1, 2001. After lengthy discussion, the Board directed staff to issue the certification *contingent on the submittal of the information we had requested*.

After the June 1, 2001 meeting, we continued to work with Ms. Parente and her consultants to obtain the requisite information. Corps staff working on this project were kept apprised of our efforts and again provided us extensions for action on the certification application. Finally, a wholly inadequate report was submitted by Ms. Parente's consultants. We advised the consultants of the deficiencies and received assurances that they would be corrected. A meeting with Ms. Parente's consultants was scheduled for August 6, 2001 to discuss these technical matters, but this meeting was postponed at the consultants' request. We presumed initially that the delay was necessary to allow the consultants additional time to evaluate solutions to our technical concerns. However, it quickly became evident that Ms. Parente and her consultants were pursuing an alternative track to 404 permitting for this project that would circumvent the Regional Board's input. On August 7, 2001 memo, Corps staff forwarded us a copy of a memo from one of Ms. Parente's consultants to the Corps, asserting that we had waived certification for the project, and that the Corps could and should proceed to issue the 404 permit. The memo was replete with factual errors and misrepresentations, which we later detailed in a follow-up letter to the Corps staff. Regrettably, we were advised on August 8, 2001 that the Corps staff had been directed by their management to issue the 404 permit that day, without the condition that a certification be obtained from the Regional Board. It appeared that responsible Corps management had accepted the allegations in the August 7, 2001 from Ms. Parente's consultants and were unwilling to entertain any arguments to the contrary, either from Board staff or the Corps staff actively engaged with the project. In light of these circumstances, and with the advice of the Board's legal counsel and direction from the Board's Chair, the Executive Officer wrote to the applicant on August 8, 2001, denying certification for the project without prejudice.

On August 8, 2001, the Corps issued a permit for the project. Contrary to our prior understanding, the permit did include the condition that a 401 certification would need to be obtained prior to the issuance of the final Department of the Army permit.

It was then the working assumption of at least Board staff and Corps staff that the certification had been denied on August 8, 2001 and that additional information would need to be submitted by the applicant in order for the certification, and 404 permit, to be issued. This also appeared to be the assumption of the applicant's consultants, who continued to work on the technical concerns we had identified and who submitted a revised report later in 2001. One of Ms. Parente's consultants also contacted Board

staff requesting our comments on the report so that any remaining concerns could be addressed and the 401 certification/404 permit could be issued.

However, in early January 2002, we were advised that the Corps would be issuing the final permit for the project, and that permit was issued on January 11, 2002. In a "clarification" letter of January 17, 2002, the Corps amended the January 11, 2002 permit based on a finding that the Regional Board had allowed the certification application to elapse and had thereby waived certification action. Clearly, the Corps' finding is wholly contradicted by the lengthy history of the Board's, Board staff's and, perhaps most importantly, the Corps staff's prior actions with respect to this project. Further, the permit does not address the Regional Board's concerns; it does not include the mitigation we had identified as necessary to address water quality concerns.

Board staff is drafting a letter to the Corp to express our concern with the Corps' actions in this matter, especially as they relate to our ability to work productively and in good faith with Corps staff in the future. In acting on the certification request for this project, Board staff relied upon, and satisfied, deadlines established by Corps staff. It appears evident that we cannot continue to do so. In the letter, staff will ask that the Corps clarify (1) The Corps reasoning for finding that the time for Regional Board action on this application had elapsed, and (2) The Corps policy regarding oral extension of time to review applications. If the Board believes it appropriate the letter can also ask that the Corps invoke its Reevaluation procedures and revoke the 404 permit.

Irrespective of the Corps action to issue the 404 permit the Regional Board retains authority to regulate this project under the Water Code. The potential adverse impacts of this project on water quality and beneficial uses can be addressed by the Board's issuance of appropriate waste discharge requirements.

It is important to point out that there is no approved specific development proposal for this project at this time. The City of Chino Hills Planning Commission voted in May 2001 to allow the only approved Tentative Tract Map (for a part of the project site) to expire. Ms. Parente did not appeal this decision to the City Council, as was her right. When and if a specific development proposal is approved, Board staff will recommend that the Board issue appropriate waste discharge requirements.

Finally, petitions concerning the Board's and Board staff's actions on this project have been filed with the State Board. The Natural Resources Defense Council and Paulette Hawkins (a resident of Chino Hills) appealed the Board's direction to Board staff on June 1, 2001 to issue the certification upon receipt of additional information. These parties assert, in part, that the Board's action was improper because the applicant had not satisfied CEQA requirements. Attorneys for Ms. Parente (Musick, Peeler and Garrett) appealed the Executive Officer's denial without prejudice on August 8, 2001, arguing essentially that it contravened the Regional Board's June 1, 2001 direction to staff to issue the certification. In light of the Corps' action to issue the 404 permit, State Board legal counsel handling the petitions has sought input from all the petitioners as to why the petitions should not be considered moot. Ms. Parente's attorneys have withdrawn their petition. NRDC *et al* have submitted arguments that the questions raised in their petition should be addressed by the State Board, since, in part, the issues of concern to them may recur. We are awaiting a final decision with respect to the State Board's disposition of the petitions.